Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-485

CARL KEISTER AND HOWARD G. WILLAMON, Petitioners,

v.

SAN DIEGO AND ARIZONA EASTERN RAILROAD,
a corporation, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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NO. _____

CARL KEISTER AND HOWARD G. WILLAMON, Petitioners,

v.

SAN DIEGO AND ARIZONA EASTERN RAILROAD, a corporation, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Carl Keister and Howard G. Willamon respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in these proceedings on July 5, 1977.

OPINION BELOW

The opinion of the Court of Appeals appears in Appendix A hereto. It is unreported. The opinions and judgment rendered by the District Court for the Southern District of California also appear in Appendix B through D.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit Court was entered on July 5, 1977. On August 8, 1977, the

Court of Appeals ordered the issuance of mandate stayed until August 20, 1977. On August 24, 1977, the stay was extended until October 3, 1977. This petition for certiorari was filed within 90 days of the entry of the judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

An American citizen suffers an injury during the course of his employment by an American railroad engaged in interstate commerce. The employee is a brakeman on a train originating in San Diego, California. A portion of the train's route is within the Republic of Mexico and the employee has duties on both sides of the international border. As a result of a negligent act by the railroad within the United States, the employee is injured while in Mexico. He is performing duties in furtherance of interstate commerce at the time he is injured.

Quare, is the fact that the injury is sustained in a foreign country a bar to relief under the provisions of the Federal Employers' Liability Act as amended in 1939, 45 U.S.C. § 51 *et sec?*

STATUTORY PROVISIONS INVOLVED

These actions involve § 1 of the Federal Employers' Liability Act, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U.S.C. § 51. As originally enacted § 1 provided that every railroad, while engaging in interstate or foreign commerce,

> "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its

> negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 35 Stat. 65.

An additional paragraph was added to the section in 1939. The amendment expanded the definition of "person . . . employed" in interstate or foreign commerce. The Amendment reads:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act . . . ." 53 Stat. 1404.

STATEMENT OF THE CASE

The Factual Background

Petitioner Howard G. Willamon, an American citizen, was employed as a brakeman by the respondent, an American railroad.[1] He was injured while working on a scheduled run which operated daily between San Diego and El Centro, California.[2] The railroad tracks between San Diego and El Centro follow a southeasterly route across the California border into the Republic of Mexico; run along that side of the border for about one-third of the total distance, then cross back into California for the balance of the trip.[3]

Mr. Willamon was injured on the Mexican side of the border while riding in the cab of the locomotive.[4] He was shot in the right eye by a metal B-B projected into the cab through an open

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1. References to the Record and other sources are set forth beginning at page 12.

window.[5] It was an almost everyday occurrence for the train, in that area, to be shot at by B-B guns and to be used as a moving target for rocks and other missiles.[6] Other employees had reported such incidents to the respondent and it was aware of the problem.[7] Nevertheless, the cab of the locomotive did not have any safety wire mesh screen or other protective devices on the windows to keep thrown or propelled objects from entering the interior of the cab.[8] The respondent admits that complaints concerning propelled missiles were more numerous for moves in Mexico than in California.[9] It had hired special agents to look for the perpetrators of the occurrences in California, but was not taking similar precautions in Mexico.[10]

Petitioner Carl Keister, an American citizen, was also injured while working for the respondent as a brakeman on a run originating in San Diego.[11] It was a switching operation involving the movement of freight cars in the vicinity of San Ysidro, California and Tijuana, Baja California, Mexico.[12] The destination of the trip is disputed. The respondent asserts it was Mexico; however, Mr. Keister contends the trip was designated as beginning and ending in San Diego.[13] For payroll purposes, "on-duty" hours for the trip were computed from the time the train left San Diego until it returned later the same day.[14]

Mr. Keister sustained a back injury in Mexico while operating a switch about one kilometer south of the border.[15] The respondent had knowledge that the switch was defective before the date of the injury.[16] Mr. Keister was not warned of the defect although it was customary for the respondent to do so by issuing bulletins from its offices in San Diego or San Ysidro.[17] The railroad tracks and associated facilities in Mexico were leased by the respondent.[18] The day after Mr. Keister was injured, the respondent sent an employee into Mexico to repair the switch.[19]

The Proceedings In The Courts Below

The petitioners brought the instant actions in the District Court of the United States for the Southern District of California. Each complaint alleged that the railroad and the employee were engaged in interstate commerce when the injury was sustained. Jurisdiction of the District Court was invoked because the actions arose and were brought pursuant to the provisions of the Federal Employers' Liability Act, 45 U.S.C. § 51 *et sec.*[20] In both actions, the respondent filed a motion to dismiss under the provisions of the Federal Rules of Civil Procedure: (1) for lack of jurisdiction over the subject matter pursuant to Rule 12(b)(1), and (2) because the complaint failed to state a claim upon which relief could be granted pursuant to Rule 12(h). In the alternative, respondent sought an order granting summary judgment, pursuant to Rule 56, on the ground that there was no genuine issue as to any material fact.[21] The sole basis for the motions was that petitioners sustained their injuries in a foreign country.[22]

The District Court granted respondent's motion to dismiss the *Keister* action for lack of jurisdiction over the subject matter and a judgment of dismissal on that ground was entered.[23] Respondent's motion was denied as to *Willamon,* but the District Court certified the question for an interlocutory appeal pursuant to the provisions of 28 U.S.C. § 1292(b).[24] The Court of Appeals affirmed the District Court's dismissal of the *Keister* action.[25] It permitted an interlocutory appeal of the *Willamon* action and reversed the judgment of the District Court.[26]

The Question Presented and the Statement Of The Case herein are based on the petitioners' contentions of the facts. The respondent denied many of these assertions in its answers to the complaints. However, it did not dispute them in connection with

its motions to dismiss, with one exception. It disputed the destination of the run on which petitioner Keister was working. Subject to that exception, petitioners' factual contentions were and are not an issue in determining whether the actions should have been dismissed.

REASONS FOR GRANTING THE WRIT

The petition presents an important jurisdictional question affecting the scope and effect of the 1939 amendment to the Act which has not been settled by this Court. It stems from this Court's decision in *New York Central Railroad Co. v. Chisholm*, 268 U.S.C. 29 (1925). That decision is cited by the Courts below as standing for the proposition that the Act does not apply to employees who sustain injuries while in foreign countries. *Chisholm* typified this Court's strict construction of the Act before it was amended by Congress in 1939. Since the amendment, this Court has consistently construed the Act liberally so as to permit recovery for injuries occurring under a variety of circumstances where relief was previously denied. However, the effect of the Amendment on the rights of employees injured in foreign countries has not been determined by this Court.

An entire class of American railroad employees is affected by the question presented. The class consists of employees whose duties carry them into foreign countries. The size of the class is unknown to petitioners, but it is reasonable to assume that it is substantial since thirteen states have rail lines crossing our national frontiers into Canada or the Republic of Mexico.[27] It is important to the interests of all these employees that the issue herein be resolved.

The respondent's basic contention is that American employees

whose duties carry them into foreign countries are, as a class, excluded from the benefits of the Act. The concept of class exclusion was rejected, in principle, by this Court in *Reed v. Pennsylvania Railroad Co.*, 351 U.S. 502 (1955). In *Reed*, a clerical employee of the railroad was injured when a cracked window pane in her office blew in upon her. The railroad advanced the argument that clerical employees as a class were excluded from the benefits of the Act. (At page 505.) This Court rejected that argument, stating:

> "[T]he 1939 amendment specifically affords protection to 'any employee' whose duties bring him within that amendment. There is no basis in the language of § 1 for confining liability of the railroad so as to exclude any class of railroad employees as a class. . . . Section 1 cannot be interpreted to exclude petitioner from its benefits without further consideration of the function she performs and its impact on interstate commerce.
>
> We think that the present petitioner is employed by the respondent in interstate commerce within the meaning of the 1939 amendment to § 1. Although the amendment may have been prompted by a specific desire to obviate certain court-made rules limiting coverage, the language used goes far beyond that narrow objective. It evinces a purpose to expand coverage substantially as well as to avoid narrow distinctions in deciding questions of coverage. Under the amendment, it is the 'duties' of the employee that must further or affect commerce, and it is enough if 'any part' of those duties has the requisite effect." (At page 506.)

The *Chisholm* decision and the decisions below are contrary, in principle, to the above interpretation of the 1939 Amendment by this Court. It is important that this Court settle the question so as to correct improper administration of the Act and prevent its erosion by the continued application of a narrow and anachronistic construction.

A resolution of the question is also important to promote the

policies of certainty and uniformity expressed by Congress when it enacted the 1939 Amendment. The report of the Senate Committee on the Judiciary notes that "in railroad switching service particularly, men may be engaged in interstate and intrastate commerce intermittantly several times during a single tour of duty."[28] The report goes on to note that "the Amendment will provide uniform treatment in the event of injury or death while so employed."[29] There is nothing in the legislative history of the Amendment to suggest that Congress intended to withhold the benefits of the Act from employees injured in foreign countries so long as their duties further or affect interstate or foreign commerce. To allow the *Chisholm* decision to stand under the circumstances presented would frustrate the humanitarian purpose of Congress without advancing any underlying policy of the Act or any legitimate interest of the respondent.

Several district courts and the Court of Appeals for the Ninth Circuit and for the Sixth Circuit have deferred to this Court on the question of the continued viability of the *Chisholm* decision. As a result, it is important that this Court exercise its power of supervision over matters involving the jurisdiction of the federal district courts. The District Court below expressed its view that the *Chisholm* decision was controlling as to *Keister* but not as to *Willamon*, stating:

> [I] don't think it was ever intended . . . by the Congress, as interpreted by the CHISHOLM case, that it would apply to a case such as a WILLAMON case where the train never stops, so to speak, it ran through the foreign country. I don't think they intended the employees to put on a sombrero as they crossed into Mexico and take it off when they get back to the United States.[30]

The District Court was also of the opinion that it was bound to apply *Chisholm* in the *Keister* action, even though it produced

the wrong result:

> I think it's wrong. I think the Supreme Court, today, would probably take a look at CHISHOLM under these facts, but I'm bound to follow what I think the Supreme Court says. I may be wrong, but in good conscience I must dismiss that case.[31]

The Ninth Circuit reversed the District Court's ruling as to *Willamon* and affirmed the dismissal of the *Keister* action. Without expressing an opinion as to the correctness of the result, the Ninth Circuit held, "Only the Supreme Court or Congress can properly modify the reading of the Act adopted in *Chisholm*." Similarly, in *Cox v. Chesapeake Ohio Railroad Co.*, 494 F.2d 349 (6th Cir. 1974), *cert. denied* 417 U.S. 977 (1974), the Sixth Circuit and the District Court for the Eastern District of Michigan deferred to this Court on the continued viability of *Chisholm*. The lower federal courts have demonstrated their reluctance to abandon the *Chisholm* decision without this Court's approval. It is important to the proper development of the law that this Court exercise its power of supervision by resolving what has become a recurring question of Federal jurisdiction.

The *Chisholm* decision is itself ambiguous and in need of clarification. Did this Court hold that the existence of a right of action under the Act turns upon: (1) the place of the injury or (2) the place of the negligent act? From the statement of facts set forth in the Certificate from the Circuit Court in *Chisholm*, and the briefs filed in this Court, it is undisputed that the negligence of the railroad, if any, occurred in Canada. If this Court intended *Chisholm* to turn on the place where the negligence occurred, the Courts below have erroneously extended *Chisholm* to a new and different factual situation. The distinction is that in the instant cases the negligence is alleged to have occurred within the United States.

The practical effects of allowing *Chisholm* to remain controlling law are counter-productive to the objective of the Act. The Act is intended to promote safety by permitting employees to recover for their employer's negligence. However, the *Chisholm* decision encourages carelessness and a niggardly approach to safety measures. The facts in *Willamon* present a graphic example. The respondent hired special agents to search for persons propelling missiles at trains in California. It did not do so in Mexico even though complaints concerning propelled missiles were more numerous for operations in Mexico than in California. Its decision not to do so is understandable. Why should the respondent have spent the money to hire guards, or to screen the windows of the locomotive, if it was not responsible for injuries occurring in Mexico? Similarly, in *Keister,* why should the respondent's San Diego office have been concerned about warning petitioner Keister that the switch in Mexico was defective, and why should it have felt any urgency about sending an employee into Mexico to repair the defect?

Allowing *Chisholm* to remain controlling law is also tantamount to reenacting the doctrine of assumption of risk which was repudiated by this Court in *Tiller v. Atlantic Coast Line Railroad Co.*, 318 U.S. 54 (1943), because the employee is required to assume the risk of being injured while working in a foreign country. This is particularly true in a case such as *Willamon* where the working conditions in the foreign country were more hazardous than in the United States.

Another practical effect of the *Chisholm* decision is to place railroad employees in a position where their likelihood of obtaining any meaningful recovery is uncertain. For example, petitioners contend that the California Workmens' Compensation laws provide no remedy where the employee's duties at the time of his

injury are in furtherance of or affect interstate commerce.[32] Respondent disagrees.[33] Even if the respondent is correct about the California Law, this Court is well aware that workmens' compensation laws vary substantially from state to state as to eligibility and benefits. Therefore, it is important to settle the question presented because of the practical effects of not doing so.

CONCLUSION

Railroad employees engaged in "transportation" have always been intended to be the primary beneficiaries of the Act because of the hazardous nature of their occupation. It is ironic if file clerks are entitled to the benefits of the Act and the petitioners are not. For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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SMITH, BIGGINS, BOLLMAN & MOGILNER

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Counsel for Petitioners

REFERENCES TO THE RECORD AND OTHER SOURCES

"RT" refers to the Reporters' Transcripts of Proceedings in the District Court for purposes of appeal. "K" refers to the Clerk's Record on Appeal in the *Keister* action (75-2431). "W" refers to the Clerk's Record on Appeal in the *Willamon* action (75-2495).

1. W 76, lines 17-19; and W 6, lines 10-15.
2. W 112, lines 21-28; W 112, line 31 through W 113, line 1; W 120, lines 13-17; and RT 38, line 13.
3. RT 26, lines 12-15; RT 38, lines 7-13; RT 40, lines 2-6; and Rand McNally & Company's *Handy Railroad Atlas of the United States,* copyright 1973, at page 10.
4. W 6, lines 19-25; and W 117, lines 3-6.
5. W 83, line 30 through W 84, line 1; and W 34, lines 31-32.
6. W 35, lines 1-2; and W 32, lines 23-32.
7. W 117, line 31 through W 118, line 22; W 3, line 32 through W 33, line 1; and W 35, lines 4-5.
8. W 116, lines 17-22.
9. W 121, line 31 through W 122, line 4.
10. W 122, line 31 through W 123, line 25.
11. K 12, lines 22-25; K 55, lines 5-10; K 110, lines 21-25.
12. K 111, lines 1-11; and K 55, lines 5-8.
13. K 107, lines 24-28; and K 110, lines 21-25.
14. K 110, lines 25-27; and K 111, lines 20-22.
15. K 96, lines 25-27; and K 50-51.
16. K 76-77; and K 74-75.
17. K 96, line 28 through K 97, line 4.
18. K 78-79.
19. K 94.

20. W 1-4 and K 1-4 (particularly W 1, line 27 through W 2, line 4 and K 1, line 27 through K 2, line 1 relating to allegations of federal jurisdiction, and that petitioners and respondent were engaged in interstate commerce when the injuries occurred).
21. W 16-18; K 44-46.
22. W 17-20; K 45-51.
23. K 121-123. See Appendix "B" and "C" herein for order and judgment.
24. W 63-64. See Appendix "D" herein for order.
25. See Appendix "A" herein for opinion and judgment.
26. W 65; see Appendix "A" herein for opinion and judgment.
27. Alaska, Arizona, California, Idaho, Maine, Michigan, Minnesota, Montana, New York, North Dakota, Texas, Vermont and Washington. Rand McNally & Company's *Handy Railroad Atlas of the United States,* copyright 1973.
28. Report of the Senate Committee on the Judiciary on Senate bill No. 1708, to amend section 51 of chapter 2, title 45, of the United States Code, 76th Cong., 1st Sess., Rept. No. 661 (1939), at page 3.
29. *Id.*
30. RT 43, line 23 through RT 44, line 5.
31. RT 44, lines 13-17.
32. W 60-62; K 117-119.
33. W 59; K 105.

APPENDIX "A"

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARL KEISTER, *Plaintiff-Appellant,* vs. SAN DIEGO AND ARIZONA EASTERN RAILROAD, a corporation, *Defendant-Appellee.*	No. 75-2431
HOWARD G. WILLAMON, *Plaintiff-Appellee,* vs. SAN DIEGO AND ARIZONA EASTERN RAILROAD, a corporation, *Defendant-Appellant.*	No. 75-2495 ORDER

[July 5, 1977]

Appeal from the United States District Court
for the Southern District of California

Before: BROWNING and ELY, Circuit Judges, and
EAST,* District Judge.

We are satisfied that in neither action is there a possible claim for which relief may be granted under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1970), as construed by the Supreme Court in *New York Central R.R. v. Chisholm*, 268 U.S. 29 (1925). *See Cox v. Chesapeake & Ohio R.R.*, 494 F.2d 349 (6th Cir. 1974), *cert. denied*, 417 U.S. 977 (1975); *cf. Lauritzen v. Larsen*, 345 U.S. 571, 580-81 (1953) (citing *New York Central R.R. v. Chisholm* with apparent approval). Only the Su-

*Honorable William G. East, United States District Judge, District of Oregon, sitting by designation.

preme Court or the Congress can properly modify the reading of the Act adopted in *Chisholm*.

We do not consider the applicability of the Boiler Inspection Act, 45 U.S.C. §§ 22-34 (1970). This issue was not raised or considered below.

The judgment in No. 75-2431 is affirmed.

The judgment in No. 75-2495 is reversed.

APPENDIX "B"

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CARL KEISTER, *Plaintiff,* vs. SAN DIEGO & ARIZONA EASTERN RAILROAD, a corporation, *Defendant.*	CIVIL NO. 73-462-T ORDER GRANTING MOTION TO DISMISS FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER

The motion of defendant SAN DIEGO & ARIZONA EASTERN RAILROAD COMPANY to dismiss the complaint for lack of subject matter jurisdiction and because the complaint fails to state a claim upon which relief can be granted, or in the alternative for summary judgment, came on regularly for hearings in the above-entitled court on the 10th day of February, 1975, and the 31st day of March, 1975, before the Honorable Howard B. Turrentine. Defendant appeared by its attorney David E. Monahan of GRAY, CARY, AMES & FRYE; plaintiff appeared by his attorneys, Robert S. Kennedy and Clyde C. Crockett of KENNEDY & CROCKETT. The Court having heard the arguments of counsel, having reviewed the memoranda of points and authorities and affidavits submitted by both sides, and being fully advised,

IT IS ORDERED that defendant's motion be, and the same hereby is, granted, due to a lack of subject matter jurisdiction, and the complaint dismissed.

DATED: 4-14-75

HOWARD B. TURRENTINE
JUDGE

APPROVED AS TO FORM:
Clyde C. Crockett
/s/ CLYDE C. CROCKETT
Clyde C. Crockett
Attorney for Plaintiff

APPENDIX "C"

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CARL KEISTER, *Plaintiff,* vs. SAN DIEGO & ARIZONA EASTERN RAILROAD, a corporation, *Defendant.*	CIVIL NO. 73-462-T JUDGMENT OF DISMISSAL

The defendant's MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT having been heard,

IT IS ORDERED, ADJUDGED AND DECREED that the action be dismissed for want of subject matter jurisdiction, and that defendant recover its costs.

HOWARD B. TURRENTINE
JUDGE

DATED: 4-14-75

APPENDIX "D"

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD G. WILLAMON, *Plaintiff,* vs. SAN DIEGO & ARIZONA EASTERN RAILROAD, a corporation, *Defendant.*	CIVIL NO 73-71-T ORDER DENYING MOTION TO DISMISS FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER AND CERTIFYING ISSUE FOR INTERLOCUTORY APPEAL

The defendant SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT came on regularly for hearing in the above-entitled court on the 31st day of March, 1975, before the Honorable Howard B. Turrentine. Defendant appeared by its attorney David E. Monahan of GRAY, CARY, AMES & FRYE; plaintiff appeared by his attorney, Clyde C. Crockett of KENNEDY & CROCKETT.

Upon consideration of the affidavits filed by plaintiff, and the memoranda of points and authorities filed by plaintiff and defendant, and after hearing argument of counsel on both sides,

IT IS ORDERED that defendant's motions be, and the same hereby are, denied.

The above order involves a controlling question of law as to which there is substantial ground for difference of opinion, namely, whether or not the Federal Employers Liability Act applies to the facts of the instant case, which involves an injury to defendant's employee at the time said employee was engaged in the course of his employment in the Republic of Mexico. An immediate appeal from the order may materially advance the ultimate termination of the litigation in the event the order is affirmed, and may preclude the necessity for further proceedings, including trial, in the event the order is reversed.

IT IS FURTHER ORDERED that all further proceedings

herein shall be, and hereby are, stayed pending determination by the Court of Appeals whether or not to permit an interlocutory appeal from this order pursuant to 28 U.S.C. § 1292(b), or until further order of this court.

HOWARD B. TURRENTINE
JUDGE

DATED: 4-14-75

APPROVED AS TO FORM:
/s/ CLYDE C. CROCKETT
Clyde C. Crockett
Attorney for Plaintiff

77-485

Supreme Court, U. S.
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OCTOBER TERM, 1977

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v.

SAN DIEGO AND ARIZONA EASTERN RAILROAD COMPANY
a corporation, *Respondent.*

OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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a corporation, *Respondent*.

OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent, San Diego and Arizona Eastern Railway Company, respectfully requests that this Court deny the Petitions for Writs of Certiorari to review the judgment and opinion of the United States Court of Appeals of the Ninth Circuit entered in these proceedings on July 5, 1977.

OPINIONS BELOW

The opinions are adequately set forth in the Petition, except that Respondent attaches the Order Consolidating Cases for Argument and Submission dated October 21, 1975 by the Ninth Circuit as Appendix A.

JURISDICTION

The jurisdictional requisites are set forth in the Petition. Respondent, however, opposes a consolidated Petition for Certiorari on the basis that there is no jurisdiction for a consolidated Petition. The Order Consolidating the Cases below was for argument and submission only, and did not consolidate the cases for briefing. [Appendix A.] Respondent submits that each party plaintiff should separately Petition for a Writ of Certiorari.

QUESTION PRESENTED

Whether the Federal Employer's Liability Act, 45 U.S.C. 351 *et seq.* (hereinafter "FELA"), applies to railroad employees who sustained injuries in foreign countries while in the service of their United States employer?

STATEMENT OF FACTS

Petitioner Keister was injured August 3, 1973, in Mexico by allegedly defective Mexican equipment while he was employed by Respondent on a train destined for a location in Mexico.

Petitioner Howard G. Willamon was injured February 10, 1973, while riding the Respondent's train in Mexico, when a metal object propelled by an unidentified third person outside of the train struck his right eye.

As a result of the foregoing, Petitioners Keister and Willamon filed lawsuits against the Respondent railroad, invoking Federal jurisdiction on the basis that the FELA was applicable.

REASONS FOR DENYING THE WRITS

1. There Is No Conflict With The Decisions Of This Court.

The United States Supreme Court has consistently held that the FELA is not applicable to a United States citizen who

has sustained injuries in a foreign country while in service of his United States employer. The leading case denying extraterritorial application of the FELA is *New York Central Railroad Co.* v. *Chisholm,* 268 U.S. 29 (1925). Petitioner attempts to construct a conflict between decisions of this Court, but examination of those cited decisions reveals that there is no conflict. Rather, the Court has consistently maintained for three-quarters of a century that the FELA has no extraterritorial application.

As in the instant case, the *Chisholm* case involved injuries to a United States citizen-employee while employed on a train operated by a United States employer. The injury in the *Chisholm* case was suffered at a point just north of the United States-Canadian border on the New York Central Railroad Company's run between Malone, New York and Montreal, Canada. In the process of construing the FELA, the Supreme Court noted that the FELA statute:

> "Contains no words which definitely disclose an intention to give it extraterritorial effect, nor do the circumstances require an inference of such purpose." 268 U.S. at 31.

Petitioners have suggested that a 1939 amendment to the Act broadened the scope of the Act. However, thirteen years after this 1939 amendment, the United States Supreme Court reaffirmed its long standing decision that the FELA should not be applied to United States citizens who may sustain injuries abroad while in service of their United States employers. In *Lauritzen* v. *Larsen,* 345 U.S. 571 (1952), the Court reaffirmed the *Chisholm* ruling that the FELA has no extraterritorial application.

In their effort to attempt to create a conflict, Petitioners cite *Reed* v. *Pennsylvania Railroad Co.,* 351 U.S. 502 (1955), for the proposition that a class may not be excluded from benefits

of the FELA. The court in that case held that a clerical employee of the railroad was entitled to coverage under the FELA. Petitioners have attempted to create a class consisting of "employees whose duties carry them into foreign countries." [Petition, page 6.] There is no class exclusion. Any employee of a railroad injured within the United States is entitled to the benefits of the Act. On the other hand, any employee (including a clerical employee) injured outside of the United States is not covered under the Act. *Reed* v. *Pennsylvania Railroad Co.* did not address the question of extraterritorial application of FELA. To the contrary, this Court's decision in *Chisholm* has been later reaffirmed in *Lauritzen* v. *Larsen,* in which the Court found no reason to depart from *Chisholm's* clear and long-standing construction regarding the extraterritorial nonapplication of the FELA.

2. There Is No Conflict Between Decisions of the Circuits.

The present decisi[on] is fully in accord with the only other decision by a Co[urt] of Appeal in which the same issue has been squarely presented. *Cox* v. *Chesapeake Ohio Railroad Co.,* 494 F.2d 349 (6th Cir. 1974), *cert. den.* 417 U.S. 977 (1975). In *Cox,* the plaintiff, while employed by the Chesapeake Ohio Railroad Company, a United States employer, was transported across the border to Duton, Canada, in order to perform services. While he was performing those services under the direct supervision and control of the railroad's officers and while performing said services with equipment furnished, permanently located, and serviced by the railroad from its facilities located in Detroit Michigan, Cox sustained serious personal injuries, allegedly as a result of the railroad's failure to provide proper equipment.

Cox alleged the negligent acts occurred within the United States. The Sixth Circuit in *Cox* stated:

> "*Chisholm* remains a firm restriction on the extraterritorial application of FELA. Indeed, the Supreme Court apparently added to this resolve in *Lauritzen* v. *Larsen* wherein it stated that 'we have held FELA not applicable to an American citizen's injuries sustained in Canada while in service of an American employer.' " 494 F.2d at 350.

The only circuits that have considered the question (i.e., the Sixth and the Ninth) have unanimously upheld this Court's ruling in *Chisholm* that FELA does not apply extraterritorially.

3. The *Chisholm* Decision Is Not Ambiguous.

Petitioners seek to distinguish *Chisholm* on the grounds that the complaints allege acts of negligence occurring within the United States. In *Lauritzen* v. *Larsen,* the court focused on the place of injury by stating:

> "The Federal Employer's Liability Act [is] not applicable to an *American citizen's injury sustained in Canada* while in service of an American employer. *New York Central Railroad Co.* v. *Chisholm,* 268 U.S. 29." (Emphasis added.) 345 U.S. at 579.

If *Chisholm* were read as Petitioners suggest, the ruling of *Chisholm* would be severely undermined in that a pleader could always allege that some act of negligence occurred within the territorial limits of the United States. Petitioner Keister's injury resulted from an alleged defect in a switch permanently located in the Republic of Mexico and owned, not by the railroad, but by the Tijuana and Tecate Railway Company, a Mexican corpora-

tion. Petitioner Willamon's injury was inflicted by an unknown third party while Willamon was "on the Mexican side of the border while riding in the cab of the locomotive" according to Petitioner's statement of the facts. [Petition, page 3.] There is no ambiguity in applying *Chisholm* to the facts of the present case.

4. There Is No Issue Warranting Review on Certiorari.

Petitioners do not contend that there is any important question of constitutional law requiring review by this Court. Further, there is no important public policy requiring such review. The FELA was first enacted in 1908, before enactment by the majority of states of worker's compensation laws. The purpose of the FELA was to modify the common law master-servant relationship and to place on railroads the cost of injuries suffered by their employees, since such injuries were deemed to be part of the costs of doing business. At present, however, railroad employees are among the very few employees still authorized to sue their employers. The vast majority of employees have remedies for injuries suffered in the course of their employment under the various state worker's compensation laws. Under worker's compensation laws, employees receive the benefit of no-fault coverage. In California, Labor Code Sections 3600.5 and 5305 clearly provide for extraterritorial effect of the worker's compensation laws. Moreover, Petitioners have been unable to identify any border state that prohibits the extraterritorial application of a worker's compensation scheme of recovery.

The policy of encouraging safety by employers is promoted by the comprehensive approach of worker's compensation. The employer is strictly liable for injuries. As early as 1919, the California Supreme Court held in *Terminal Railways* v. *I.A.C.*, 180 Cal. 121, 179 P. 386 (1919), that worker's compensation applies to the extent not excluded by FELA. Since FELA does not apply extraterritorially, worker's compensation is available, and provides an incentive for an employer to prevent injuries occurring in the course and scope of any employment, whether within the United States or extraterritorially. Because worker's compensation applies to the extent that it is not excluded by FELA, there is no assumption of the risk defense available as suggested by Petitioners. Petitioners are given a different means of recovery. Petitioners have not been able to show a substantial question warranting this Court's review of the decisions by the District Court and Court of Appeals for the Ninth Circuit.

5. This Identical Issue Was Recently Denied Review by Petition for Certiorari.

In 1974, the Sixth Circuit in *Cox* recognized the continued vitality of the *Chisholm* rule restricting extraterritorial application of the FELA. This Court denied Certiorari in that case. *Cox* v. *Chesapeake Ohio Railroad Co.*, 494 F.2d 349 (6th Cir. 1974), *cert. den.* 417 U.S. 977 (1975).

CONCLUSION

No amount of rhetoric can transform the facts of these cases into a case justifying Supreme Court review. The precise issue of the extraterritorial application of the FELA was definitely determined by the Supreme Court over three-quarters of a century ago by *Chisholm*, and has been reaffirmed by the Supreme Court as recently as 1952 in *Lauritzen*. The decisions below are not in conflict with any decisions of this Court or with the decisions of other circuits. Manifestly, there is no important question of constitutional law or public policy requiring review by this Court. Therefore, the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

STERLING HUTCHESON
DAVID E. MONAHAN
MARILYN L. HUFF

By:
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Attorneys for Respondent

OF COUNSEL:
GRAY, CARY, AMES & FRYE

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 21 1975

EMIL E. MELFI, JR. CLERK
U. S. COURT OF APPEALS

CARL KEISTER, Plaintiff-Appellant, vs. SAN DIEGO AND ARIZONA EASTERN RAILROAD, a corporation, Defendant-Appellee.	No. 75-2431
HOWARD G. WILLIAMON, Plaintiff-Appellee, vs. SAN DIEGO AND ARIZONA EASTERN RAILROAD, a corporation, Defendant-Appellant.	No. 75-2495

ORDER VACATING ORDER AND CONSOLIDATING CASES FOR ARGUMENT AND SUBMISSION AND SETTING TIMES FOR FILING BRIEFS

In light of the opposition filed by San Diego and Arizona Eastern Railroad, and good cause appearing therefor,

IT IS ORDERED that the order filed on October 17, 1975, is vacated, and

IT IS FURTHER ORDERED that the above-captioned appeals be consolidated for purposes of argument and submission, and

IT IS FURTHER ORDERED that appellant Keister in No. 75-2431 and appellant San Diego and Arizona Eastern Railroad in No. 75-2495, shall serve and file their opening briefs on or before December 1, 1975; appellees in each case shall serve and file their briefs on or before January 12, 1976; and appellants shall serve and file their reply briefs on or before January 30, 1976.

DATED: October 21st, 1975.

United States Circuit Judge

Supreme Court, U. S.
FILED
NOV 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-485

CARL KEISTER AND HOWARD G. WILLAMON, Petitioners,

v.

SAN DIEGO AND ARIZONA EASTERN RAILROAD,
a corporation, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-485

CARL KEISTER AND HOWARD G. WILLAMON, Petitioners,

v.

SAN DIEGO AND ARIZONA EASTERN RAILROAD,
a corporation, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

1. Workmens' Compensation Is Not Available.

On page 6 of its Brief the Respondent asserts that Petitioners are entitled to receive workmens' compensation benefits under California law, and that "Petitioners have been unable to identify any border state that prohibits the extraterritorial application of a worker's compensation scheme of recovery." The State of Michigan adopted that prohibition in 1977.[1] Its action came as a postscript to the *Cox v. Chesapeake Ohio Railroad Co.* decision referred to on page 9 of our Petition and on pages 4, 5 and 7 of Respondent's Opposing Brief. Oscar E. Cox filed a claim for workers' disability compensation in the State of Michigan after this Court denied his petition for a writ of certiorari to review

1. Petitioners discovered this information after filing their Petition.

the dismissal of his action for damages under the Federal Employers' Liability Act.

When notified of the claim the Chesapeake Ohio Railroad Co. filed an answer by special appearance and a motion to dismiss. On April 27, 1976, a hearing on the motion to dismiss was held before the Bureau of Workers' Disability Compensation for the State of Michigan.[2] The railroad argued that Cox was not entitled to disability compensation because he was engaged in interstate and foreign commerce at the time he was injured in Canada. It argued that the Federal Employers' Liability Act is the exclusive remedy available to employees engaged in interstate or foreign commerce and that employees so engaged are not within the jurisdiction of the workmens' compensation act of any state. A portion of the reporter's transcript appears in Appendix A.

On January 21, 1977, the Bureau of Workers' Disability Compensation granted the Railroad's motion and dismissed Mr. Cox's claim for disability compensation. A copy of the decision appears in Appendix B.[3]

The Railroad's argument and the Bureau's decision were based upon the opinions of this Court in *New York Central R.R. Co. v. Winfield,* 244 U.S. 147 (1917); *Erie R.R. Co. v. Winfield,* 244 U.S. 170 (1917) and *New York Central R.R. Co. v. Tonsellito,* 244 U.S. 360 (1917). Those decisions hold that the Federal Employers' Liability Act is the exclusive remedy available to railroad employees injured while engaging in interstate commerce. In the *Tonsellito* decision this Court stated:

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2. The hearing was held before the Honorable Ernest F. Hapke, Administrative Law Judge of the Bureau of Workers' Disability Compensation, at 610 Pontiac State Bank Building, 28 North Saginaw, Pontiac, Michigan.
3. An appeal from that decision may be pending.

> [T]he act 'is comprehensive and, also, exclusive' in respect of a railroad's liability for injuries suffered by its employees while engaging in interstate commerce. 'It establishes a rule or regulation which is intended to operate uniformly in all the States, as respects interstate commerce, and in that field it is both paramount and exclusive.' Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the State. (at pages 361 and 362.)

The result of the above-cited decisions is that railroad employees injured while engaging in interstate commerce are precluded from receiving state workmens' compensation benefits. They are also precluded from seeking any other form of recovery under the common or statutory law of any state. The employee is left without any remedy under state or federal law if he is not entitled to the benefits of the Federal Employers' Liability Act. It follows that the employee is required to "assume the risk" of being injured while working in a foreign country because he has no remedy under our laws. Finally, there is no incentive for a railroad to prevent extraterritorial injuries because it has no financial liability. These results present important public policy issues warranting this Court's review of the decisions below.

2. The Lauritzen v. Larsen Decision.

Respondent asserts that this Court focused on the place of the *injury* in reaching its decision in *Lauritzen v. Larsen,* 345 U.S. 571 (1953).[4] Respondent also asserts that the 1939 Amendment to the FELA did not broaden the extraterritorial scope of the Act because this Court, in *Lauritzen,* reaffirmed the *Chisholm*

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4. Respondent's brief at page 5.

ruling.[5] Petitioners respectfully suggest that the opinion of this Court in *Lauritzen* does not support either of these assertions.

Lauritzen involved an action for a maritime injury under the Jones Act, 46 U.S.C. §688. The plaintiff, a Danish seaman, was negligently injured aboard a Danish ship while in Havana harbor. The plaintiff conceded that Danish law was applicable to his action, but contended that the wording of the Jones Act was broad enough to provide an optional cumulative remedy. (At pages 576-577.)

This Court made a choice of law analysis and determined that Danish law should be applied because the parties were both Danish subjects and the events took place on a Danish ship, not within our territorial waters. (At page 592.) In reaching its decision this Court reviewed seven factors which it believed were generally conceded to influence choice of law decisions.[6] Citing *Chisholm,* this Court noted that the *place of the wrongful act* was the most commonly accepted solution to choice of law problems. (At page 583.) The place of the *injury* was never mentioned as a factor to be considered in determining the applicable law.

The Respondent rewrites and distorts the opinion of this Court by asserting that it focused on the place of the injury in reaching its decision in *Lauritzen*. This is evident from the following:

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5. *id* at pages 3 and 4.
6. The seven factors were the: (1) place of the wrongful act; (2) law of the flag; (3) allegiance or domicile of the injured; (4) allegiance of the defendant shipowner; (5) place of contract; (6) inaccessibility of foreign forum and (7) the law of the forum.

This Court's opinion, 345 U.S. at 580-581:

In 1920, Congress, under the title "An Act To provide for the promotion and maintenance of the American merchant marine . . . ." and other subjects not relevant, provided a plan to aid our mercantile fleet and included the revised provision for injured seamen now before us for construction. 41 Stat. 988, 1007. *It did so by reference to the Federal Employers' Liability Act, which we have held not applicable to an American citizen's injury sustained in Canada while in service of an American employer. New York Central R. Co. v. Chisholm,* 268 U.S. 29. And it did not give the seaman the one really effective security for a claim against a foreign owner, a maritime lien.

Congress could not have been unaware of the necessity of construction imposed upon courts by such generality of language and was well warned that in the absence of more definite directions than are contained in the Jones Act it would be applied by the courts to foreign events, foreign ships and foreign seamen only in accordance with the usual doctrine and practices of maritime law. (Emphasis added.)

The Respondent's revision, Brief in Opp., p. 5:

Petitioners seek to distinguish *Chisholm* on the grounds that the complaints allege acts of negligence occurring within the United States. In *Lauritzen v. Larsen,* the court focused on the place of injury by stating:

"The Federal Employers' Liability Act [is] not applicable to an *American citizen's injury sustained in Canada* while in service of an American employer. *New York Central Railroad Co. v. Chisholm,* 268 U.S. 29." (Emphasis added.)

This transparent revision and distortion reflects the Respondents consistent reluctance to accept the fact that the above reference to *Chisholm* was made in the context of reviewing the history of the Jones Act and this Court's role in the construction of broadly worded statutes. (At pages 576-582.) At page 583 of *Lauritzen*, this Court confirmed that the place of the injury was not significant in *Chisholm*. It did so by citing *Chisholm* as a case where the law of Canada, the place of the wrongful act, was held to be applicable.

There is no reference in the *Lauritzen* decision to the 1939 Amendment to the FELA. There is nothing in the opinion to indicate that this Court intended to reaffirm *Chisholm* as standing for the proposition that the FELA does not extend to extraterritorial injuries. In fact, *Lauritzen* adds resolve to Petitioners' contention that the FELA should be applicable where the parties are United States citizens and the negligence occurs within the United States.

3. The Cox v. Chesapeake Ohio Railroad Co. Decision.

Respondent asserts that the decision in *Cox v. Chesapeake Ohio Railroad Co.*, 494 F.2d 349(6th Cir. 1974), *cert. den.* 417 U.S. 977 (1975), squarely presented the same issue as in the cases at bar.[7] It did not. In *Cox*, the sole issue presented was whether modern choice of law rules should alter the *Chisholm* decision. Although the Statement of the Facts in *Cox* suggests that the railroads negligence may have occurred within the United States, that issue was not presented for appellate review. Cox did not even mention the 1939 Amendment to the Federal Employers' Liability Act. The briefs filed by the parties contain no argument on either of these issues. The opinion rendered by the Court of Appeals For The Sixth Circuit does not indicate that it considered the 1939 Amendment to the Act or the place where the negligence occurred. Cox's petition for a writ of certiorari did not

7. Respondent's Brief at pages 4, 5 and 7.

raise either of these issues. Therefore, the issues presented here are different than in *Cox*.

4. If *Chisholm* were read as Petitioners suggest, the ruling of *Chisholm* would not be undermined.

On page 5 of its Brief, Respondent states:

> If *Chisholm* were read as Petitioners suggest, the ruling of *Chisholm* would be severely undermined in that a pleader could always allege that some act of negligence occurred within the territorial limits of the United States.

Respondent is concerned that in all cases of extraterritorial injury a plaintiff can confer jurisdiction on a District Court by merely alleging that some act of negligence occurred within the United States. Its concern is unwarranted. The allegation of negligence is subject to challenge in the same manner as the statutory $10,000.00 jurisdictional minimum in an action based upon diversity of citizenship is subject to challenge. If the defendant in a diversity action challenges the allegations of jurisdictional facts, the plaintiff must support them by competent proof and by a preponderance of the evidence. The Court will inquire into the existence of jurisdiction for the purpose of determining whether the facts support the allegations. *Nelson v. Keefer*, 451 F.2d 289, 296(3rd Cir. 1971).

The same procedure could be applied in an action under the Federal Employers' Liability Act. If the plaintiff asserts that some act of negligence occurred within the territorial limits of the United States and the defendant challenges that assertion the Court will merely conduct an inquiry to determine whether the plaintiff can support his allegation by competent proof. If not, the complaint will be dismissed. Therefore, *Chisholm* will not be undermined if read as Petitioners urge.

5. The Denial Of Benefits Constitutes Class Exclusion.

Respondent asserts that there is no class exclusion if American railroad employees whose duties carry them from the United States into foreign countries are denied the benefits of the Act.[8] Its objection relates to the definition of a class. Webster's Seventh New Collegiate Dictionary defines a class as "a group, set, or kind sharing common attributes." The aggregate group of American railroad employees whose duties carry them from the United States into foreign countries constitute a class. The common attribute is that each member of the class has duties that carry him into foreign countries. Therefore, the denial of benefits under the Act is class exclusion, a concept rejected by this Court in *Reed v. Pennsylvania Railroad Co.*, 351 U.S. 502 (1955).

8. Respondent's Brief at pages 3 and 4.

CONCLUSION

This Court has not reviewed the rights of American railroad employees injured in foreign countries since it rendered the *Chisholm* decision in 1925. That decision conflicts with more recent decisions of this Court construing the 1939 Amendment to the Federal Employers' Liability Act. *Chisholm* permits a railroad to escape financial responsibility for its negligence because its employees have no remedy under state or federal law. The District Court below recognized that the application of *Chisholm* produced the wrong result. The Courts of Appeals for the Ninth Circuit and the Sixth Circuit have indicated their unwillingness to abandon *Chisholm* without this Court's approval. Therefore, this Petition for Writs of Certiorari presents an important question of public policy affecting railroad employees in at least thirteen states. Petitioners respectfully submit that it should be granted.

Respectfully submitted,

JOSEPH J. MOGILNER AND
JOHN MICHAEL BOLLMAN
SMITH, BIGGINS, BOLLMAN & MOGILNER

ROBERT S. KENNEDY AND
CLYDE C. CROCKETT
KENNEDY & CROCKETT
Counsel for Petitioners

APPENDIX "A"

APPENDIX A

Now it is the position of the Defendants insofar as the Claim arising out of the Canadian accident near Dutton, Ontario, that this Board has no jurisdiction to entertain the Claim because at the time of the injury and accident the Plaintiff was engaged in furtherance of interstate and foreign commerce and he was employed by a railroad engaged in interstate and foreign commerce, and both were so engaged at the time of the accident, that under the law of the United States as is applied to railroad workers the Supreme Court of the United States has said, in New York Central Railroad Company versus Winfield 244 US 147, that the, 'the liability and obligation of the interstate railroad carriers to make compensation for personal injuries suffered by their employees while engaged in interstate commerce are both regulated inclusively and exclusively by the Federal Employees Liability Act, and Congress having thus fully covered the subject, no room exists for state regulations even in respect to injuries occurring without fault as to which the Federal Act provides no remedy.'

That same law has been set forth by the Supreme Court of the State of Michigan in Karey versus Grand Trunk Western Railway Company, 200 Michigan 12, where the Supreme Court stated at page 19, 'in our opinion the Winfield Cases — which I just referred to in argument, — are controlling under the Michigan Workmen's Compensation Act as under the New York Act, and that they settle conclusively for all American jurisdictions the question that employees of an interstate carrier, engaged in interstate business, are not within the jurisdiction of the state Workmen's Compensation Acts.' (at pages 4 and 5.)

APPENDIX B

APPENDIX B

(MICHIGAN DEPARTMENT OF LABOR (

BUREAU OF WORKERS' DISABILITY COMPENSATION

LANSING, MICHIGAN 48909

DECISION

Oscar E. Cox
Employee

vs.

The Chesapeake & Ohio Railway Co.
Own Risk
Employer-Insurer(s)

A hearing having been held 4-27, 19 76 at Pontiac, Michigan on petition of (plaintiff) (defendant), I find as follows:

~~That the above named employee (did) (did not) receive a personal injury arising out of and in the course of (his) (her) employment by the above named employer on~~ _____, 19____, and, as of said date of injury, said employee had an average weekly wage of $_____, in (skilled) (unskilled) labor, and had the following dependents: _____

1. **IT IS THEREFORE ORDERED** that said Defendant(s) pay compensation at the rate of $_____ per week for partial/total disability to said employee from _____ 19____ to _____ 19____ inclusive, and at the rate of $_____ from _____ 19____ to _____ 19____ inclusive, and partial/total disability to said employee from _____ 19____ to _____ 19____ inclusive, and at the rate of $_____ 19____ to _____ 19____ inclusive, and partial/total disability to said employee from _____ 19____ to _____ 19____ inclusive, and at the rate of $_____ 19____ to _____ 19____ inclusive, and further, that said employee is still totally/partially disabled and Defendant's shall pay compensation at the rate of $_____ until further order of the Bureau; and, that said Defendant(s) shall reimburse said employee $_____ for _____ (specify whether medical, hospital, etc.) with interest thereon at the rate of 5% per annum from the date each payment was due until paid. Maximum weekly benefit rates herein specified shall be adjusted as provided in Part II Sec. 9f if applicable.

2. **IT IS THEREFORE ORDERED** that the employee is entitled to receive from said defendant(s) compensation at the rate of $_____ per week for the specific period of _____ weeks from _____ 19____ for the loss of _____; and, that said Defendant(s) shall reimburse said employee $_____ for _____ (specify whether medical, hospital, etc.) with interest thereon at the rate of 5% per annum from the date each weekly payment was due until paid. Maximum weekly benefit rates herein specified shall be adjusted as provided in Part II Sec. 9f if applicable.

3. **IT IS THEREFORE ORDERED** that said Defendant(s) shall pay compensation to said Applicant(s) at the rate of $_____ per week as (total) (partial) dependents of _____ (employee) from _____ 19____ until further order of the Bureau but not to exceed (430) (500) weeks from the date of death of said employee; and further, that said Defendant(s) shall pay $_____ as follows: _____ (specify whether medical, hospital, etc.) with interest thereon at the rate of 5% per annum from the date each weekly payment was due until paid. Maximum weekly benefit rates herein specified shall be adjusted as provided in Part II Sec. 9f if applicable.

~~IT IS FURTHER ORDERED that~~ after considering arguments and briefs of the parties, defendants motion to dismiss must be and the same hereby is granted.

MAILED
FEB 17 1977
BUREAU of WORKMEN'S COMP.
LANSING, MICH.

Ernest F. Hapka
Administrative Law Judge

Signed this 21st day of January A.D. 19 77

This award (is) (is not) stipulated by the parties.
Further compensation (will) (will not) be paid voluntarily.

UNLESS A CLAIM FOR REVIEW IS FILED BY EITHER PARTY WITHIN FIFTEEN DAYS FROM THE DATE STAMPED HEREON AS "MAILING DATE", THIS DECISION SHALL STAND AS THE FINAL DECISION OF THE BUREAU OF WORKERS' DISABILITY COMPENSATION.

NO ATTORNEY FEE IN EXCESS OF 30% OF THE COMPENSATION ACCRUED IS AUTHORIZED FOR CASES WHERE THE DATE OF INJURY WAS ON OR AFTER SEPT. 1, 1965 AND 25% FOR INJURY DATE BEFORE SEPT. 1, 1965.